2013

SUPREME COURT OF THE UNITED STATES.

No. 70.

THE BOARD OF COMMISSIONERS OF THE COUNTY OF KNOX, PL'FFS IN ER.,

vs.

WILLIAM H. ASPINWALL, JOSEPH W. ALSOP, HENRY CHAUNCEY, CHARLES GOULD, AND SAMUEL L. M. BARLOW.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

INDEX.

	Original.	Print.
Declaration	1	1
Defendants' demurrer	5	3
Demurrer withdrawn	6	3
Defendants' pleas	6	3
Demurrer to defendants' pleas	13	6
Issue join	14	7
Jury sworn	14	7
Verdict of jury	15	7
Judgment	15	7
Bill of exceptions	15	7
Writ of error	30	14
Appeal bond	32	14
Citation and service	33	15
Clerk's certificate	34	15
Assignment of errors	35	16

Pleas of the circuit court of the United States for the seventh judicial circuit and district of Indiana, begun, continued, and holden at Indianapolis, in said district, on the 18th day of May, in the year of our Lord one thousand eight hundred and fifty-seven, before the Hon. John McLean, one of the Associate Justices of the Supreme Court of the United States, and the judge of said seventh circuit, and the Hon. Elisha M. Huntington, judge of said district of Indiana.

Decl'n in Assumpsit.—Damage $25,000.

WILLIAM H. ASPINWALL, JOSEPH W. Alsop, Henry Chauncey, Charles Gould and Samuel L. M. Barlow,
vs.
THE BOARD OF COMMISSIONERS OF the County of Knox.

Be it remembered that heretofore, to wit, on the 27th day of March, in the year aforesaid, the following declaration was filed in the above-entitled case:

INDIANA, *ss:*

Circuit court U. S., 7th circuit, Indiana district.

William H. Aspinwall, Joseph W. Alsop, Henry Chauncey, Charles Gould, and Samuel L. M. Barlow, citizens of the State of New York, and plaintiffs, complain of the board of commissioners of the county of Knox, a corporation created by the State of Indiana, and having its place of business in said State, a citizen of the State of Indiana, and defendant, and says: that heretofore to wit, on the twenty-fifth day of October, 1850, at the district aforesaid, the defendant subscribed for four thousand shares of the capital stock of the Ohio and Mississippi Railroad Company, of the value of fifty dollars each, and, together, of the value of two hundred thousand dollars; and afterwards, to wit, on the first day of March, 1852, in payment of a part of the said satisfaction-money, to wit, twenty-two thousand dollars, the defendant made, caused to be issued, and delivered to the pres't and directors of the Ohio and Mississippi Railroad Company, a corporation created by the law of the States of Ohio and Indiana, having its principal place of business at Cincinnati, in the State of Ohio, and a citizen of the State of Ohio, twenty-two obligations, each sealed with their seal, dated the said 1st day of March, 1852, subscribed by James Polke, then the president of said board, and attested by Abraham Smith, then

the auditor of Knox county, for the sum of one thousand dollars, and numbered severally from fifty-nine to eighty, both inclusive; and that afterwards, in further payment of the said subscription-money, about the ninth day of May, eighteen hundred and fifty-three, the defendant caused to be issued, made, and delivered to the said the president and directors of the Ohio and Mississippi Railroad Company, one hundred and twenty other obligations, each sealed with their seal, dated the first day of March, eighteen hundred and fifty-three, subscribed by the president of the said board, and attested by Abraham Smith, then the auditor of Knox county, for the sum of one thousand dollars, and numbered severally from eighty-one to two hundred, both inclusive, and, together, for the sum of one hundred and twenty thousand dollars; and making in whole one hundred and forty-two obligations, each for one thousand dollars, and numbered severally from fifty-nine to two hundred, both inclusive, so as aforesaid made, issued, and delivered.

And that by the terms of the said obligations each was payable at the North River Bank in the city of New York, twenty-five years from the date thereof, to the Ohio and Mississippi Railroad Company or bearer, on the presentation and delivery of the said obligation, with interest at the rate of six per cent. per annum, payable annually on the first day of March at said bank, in the city of New York, upon the presentation and delivery of the proper coupon attached, signed by the auditor of said county; and the plaintiffs say that they are the owners and bearers of two hundred and eighty-four of the said coupons, each for the sum of sixty dollars, and, together of the value of seventeen thousand and forty dollars; that one hundred and forty-two of said coupons, numbered severally from fifty-nine to two hundred, both inclusive, are due and payable on the first day of March, eighteen hundred and fifty-six, and that the other one hundred and forty-two of said coupons are also numbered from fifty-nine to two hundred, both inclusive, and are payable on the first day of March, eighteen hundred and fifty-seven, and that by each of said coupons the defendants, by the name of the county of Knox, promise to pay to the bearer sixty dollars at the North River Bank in the city of New York as aforesaid, and that each of them is signed by Abraham Smith, then the auditor of Knox county, and refers by its number to the obligation to which it was originally attached.

And the plaintiffs say that the defendant, though often requested so to do, has wholly neglected and refused, and yet neglects and refuses, to pay to the plaintiffs the money in the said several coupons promised to be paid, or any part thereof, to the plaintiffs' damages twenty-five thousand dollars, whereupon they sue, &c.

SAMUEL JUDAH & JOHN COBURN,
Plaintiffs' Att'ys.

And afterwards, to wit, at a circuit court begun, continued, and

holden at the same place, and before the same judges as first aforesaid, on the 19th day of May, in the year aforesaid, that being the 2d judicial day of said court, come now the parties by their attorneys and the defendant files his demurrer in these words and figures, to wit :

The said defendants come and defend the wrong and injury, when, &c., and say that said declaration and the matters therein set forth are not sufficient in law for the plaintiffs to have and maintain their action aforesaid against the defendants.

McDONALD & PORTER,
Defts' Att'ys.

And the plaintiffs say that the said declaration is sufficient, &c.

SAM'L JUDAH & McLEAN,
For Plaintiffs.

And day thereof is given.

And afterwards, to wit, at a circuit court begun and holden at the same place, before the same judges, on the 21st day of May, being the 4th judicial day of said court, come the parties, by their attorneys, and after argument heard on the dem'r heretofore filed, day thereof is given the parties.

And afterwards, to wit, on the 28th day of May, that being the 10th judicial day of said term of said court, before the same judges as aforesaid, come now the parties by their attorneys, and the court being sufficiently advised, overrule the demurrer heretofore filed, and thereupon the plaintiff strikes out the 2d count in his declaration, and the defendant, by leave of the court, withdraws the said demurrer.

And afterwards, to wit, at a circuit court begun, continued, holden on the 1st day of June, in the year aforesaid, before the same judges aforesaid, that being the 13th judicial day of said court, comes now the said defendant, and files his pleas in these words and figures :

The said defendants come and defend the wrong and injury, when, &c., and say that they did not undertake and promise in manner and form as the plaintiffs have thereof complained against them ; and of this they put themselves upon the country.

HOVEY, McDONALD & PORTER,
Defts' Att'ys.

STATE OF INDIANA, *ss :*

In the United States circuit court for the district of Indiana.

Before me, Horace Bassett, clerk of said court, personally came John B. Patterson, who being duly sworn, upon his oath says, that the matters and things stated in the foregoing pleas are true in

substance and fact, because he says he has been informed and believes that the said coupons were issued without proper authority.

Subscribed and sworn to this 29th day of May, 1857.

H. BASSETT, *Clerk.*

And the plaintiffs doth the like.

JUDAH & COBURN,
For Pltffs.

And for a further plea in this behalf, the defendants say actio non, because they say that the said supposed bonds and coupons were issued and made solely in pursuance of a supposed election and vote of a portion of the voters of said county of Knox, to determine whether said county should take and subscribe stock in the Ohio and Mississippi Railroad Company, under an act of the General Assembly of the State of Indiana, entitled "An act to amend an act to incorporate the Ohio and Mississippi Railroad Company," approved Jan. 15, 1849, and in pursuance of a supposed subscription of stock by the defendants in said company, under the supposed authority of said supposed election and vote, held and had on the first Monday of March, 1849. And the defendants aver that, upon the passage of said act, the then sheriff of said county did not forthwith give notice of said election, as by said act required; that said election was in fact held without any previous legal notice; and that at no time after the first Monday of March, 1849, was any election ever held in said county to determine whether said county should subscribe stock in said company; wherefore the defts. say that said bonds and coupons are illegal and void; and this they are ready to verify. Wherefore they pray judgment, &c.

3d. And for a further plea in this behalf, the defendants say actio non, because they say that the said supposed bonds and coupons are part and parcel of 200 bonds and the coupons thereto attached, and each being in all respects alike, except that they are numbered respectively from 1 to 200 inclusive; that all said bonds and coupons, including those mentioned in the declaration, were made and issued in consideration of and pursuant to a supposed but invalid subscription made by the defendants of 200,000 dollars to the capital stock of the said Ohio and Mississippi Railroad Company, under the said act of Jan. 15, 1849, and pursuant to no other purpose or object, and for no other consideration whatever; that the only election ever held in said county of Knox to determine whether it should subscribe for stock in said railroad company was held on the first Monday of March, 1849; that within one week prior to said election, to wit, on the 26th day of February, 1849, the defendants, at a regular session of their board, passed and adopted an order and resolution in the words and figures following, to wit: "Ordered by the board that the county of Knox subscribe two hundred thousand dollars to the capital stock of the Ohio and

Mississippi Railroad," as by their record appears; that by said order the defendants intended to increase and did increase (so far as they might under said act do so) the subscription to be afterwards made of said stock of $100,000, as provided in said act, to the sum of 200,000; defendant, however, on the subsequent ratification thereof by the voters of said county, on due notice to be given thereof at said election; and that of said action of the defendants, so increasing the said intended subscription as aforesaid, no notice was given at the different precincts of said county on the said day of said election; yet the board of commissioners of the county of Knox did, afterwards, pursuant to said election and the vote thereat taken, and pursuant to no other object, by no other authority, and for no other consideration whatever, make said invalid subscription first above in this plea mentioned, and make and issue all the bonds and coupons aforesaid, including those mentioned in the declaration; and so the defendants say that all said bonds and coupons are illegal and void; and this they are ready to verify. Wherefore they pray judgment, &c.

4th. And for a further plea in this behalf, the defendants say actio non, because they say that, in the court of the board of commissioners of the county of Knox, there is no record of any order, resolution, determination, or judgment authorizing the making or issuance of the coupons herein sued on, nor is there any record in said court of any authority given by the defendants to said Abraham Smith, auditor as aforesaid, empowering him either to make, sign, or issue said coupons. Wherefore they pray judgment, &c.

5th. And for a further plea in this behalf, the defendants say actio non, because they say that the supposed bonds and coupons in the declaration mentioned were and are part and parcel of 200 invalid bonds and coupons, each being in all respects alike, except that they are and were numbered respectively from 1 to 200 inclusive: that all said supposed bonds and coupons, including those mentioned in the declaration, were made and issued pursuant to and in consideration of a certain subscription by the defendants to the capital stock of said Railroad Company, made on the 25th day of October, 1850, for the sum of $200,000, under and pursuant to an act of the General Assembly of the State of Indiana, entitled "An act to amend an act to incorporate the Ohio and Mississippi Railroad Company," approved Jan. 15, 1849, and pursuant to no other object or purpose, and for no other consideration whatsoever. And the defendants aver that said 200 bonds, with the coupons thereto attached, including those named in the declaration, were contrary to the form of the statute aforesaid, all executed and issued to the full amount of said subscription at one and the same time, to wit, on the first day of March, 1852, and that they were not issued at the rate of one-fifth each year from the time of said subscription, as by the said statute is and was required; wherefore the defendants say that said coupons sued on are and were wholly illegal

and void; and this they are ready to verify. Wherefore they pray judgment, &c.

6th. And for a further plea in this behalf, the defendants say actio non, because they say, that neither on the first day of November, 1851, nor at any time before that day, did there exist any valid contract between the defendants and the said president and directors of the Ohio and Mississippi Railroad Company, or between the defendants and any other person whatever, touching any subscription for any stock in said company; that the bonds and coupons mentioned in the declaration were all made and issued to said company after the first day of November, 1851, in consideration of stock subscribed by the defendants in said company, and not paid for at the time of such subscription, and for no other consideration whatever; and this the defendants are ready to verify. Wherefore they pray judgment, &c.

HOVEY, McDONALD & PORTER,
Defendants' Att'ys.

The plaintiffs, by their attorney, *and* file their demurrer to the several pleas of the defendant in these words and figures, to wit:

For answer severally to the 2d, 3d, 4th, 5th, and 6th pleas by the defendant above pleaded, the pltff. says that each of said pleas, and the matters therein set forth, in manner as set forth, are insufficient in law to sustain the defendant defence by each of said pleas set up. Wherefore they pray judgment, &c.

JUDAH & COBURN,
For Plaintiffs.

And the defendants say that said pleas, and each of them, are sufficient in law.

McDONALD & PORTER,
Defts' Att'ys.

And day thereof is given.

And afterwards, to wit, at a circuit court begun, continued, and holden at the same place, and before the same judges, and on the 2d day of June, in the year aforesaid, that being the 14th judicial day of said term, come now the parties, and after argument heard on demurrer heretofore filed, the court being advised in the premises, sustains said demurrer to said pleas. It is therefore considered that the said pleas, and each of them, and the matters therein contained, are not *not* sufficient in law to bar the plaintiffs from having their said action against the defendants. And day is given thereof to the parties.

And this cause was continued from day to day for further argument, until, at a circuit court begun, continued, and holden at Indianapolis aforesaid, before the same judges as aforesaid, on the ninth day of June, in the year aforesaid, that being the 20th judi-

cial day of the May term of said court, come now the parties by their attorneys, and thereupon the issne being joined, a jury is called to try the same, and come, to wit: Archibald Lingenfelter, Elijah James, Jesse Price, Thomas F. Stout, Carlisle Vanlandingham, Thomas Morrow, Alphonso H. Bryan, David Stout, Daniel Moore, Joseph R. Klingensmith, Jacob Kunkle, and David Snyder, twelve good and lawful men of the district of Indiana, who being empanneled, tried, and sworn to well and truly try the issue joined, after hearing the evidence, the argument of counsel, and receiving the charge of the court, retire to their room, and after due deliberation had return into court the following verdict, to wit:

We, the jury, find for the plaintiffs, and assess the damages at seventeen thousand eight hundred and thirty-two dollars and thirty six cents, ($17,832 36.)

JESSE PRICE, *Foreman.*

It is therefore considered by the court that said plaintiffs have and recover of and from said defendant the said sum of seventeen thousand eight hundred and thirty-two dollars and thirty-six cents ($17,832 36) so assessed as aforesaid, as also the sum of dollars and cents, their costs and charges herein in this behalf laid out and expended.

And on the 17th day of June, in the year aforesaid, the defendant, by McDonald, filed his bill of exceptions in these words and figures, to wit:

WILLIAM H. ASPINWALL et al.
vs.
THE BOARD OF COMMISSIONERS of the County of Knox.

Be it remembered that, on the trial of this cause, the plaintiffs produced and read before the jury, first proving the signature of Abraham Smith to each of them, all the coupons mentioned in the declaration, each of which appeared on its face to be for the amount payable at the time, and of the numbers respectively as stated in the declaration, and, with the exceptions of the number and time of payment, was and is in the words and figures following, to wit:

Ohio and Mississippi R. Road subscription.—$200,000.

County of Knox, Indiana, will pay the bearer sixty dollars, at the North River Bank in the city of New York, on the first day of March, 1857, being annual interest on bond No. 59.

$60. ABR'M SMITH, *Auditor.*

Be it also remembered that the plaintiffs produced in evidence and read on said trial one of the bonds mentioned in the declaration, first proving the attestation of said Abraham Smith thereto, the

contents of which bond agreed with the description thereof in the declaration.

Be it also remembered that, on the trial of said cause, the plaintiffs produced and read in evidence a transcript from the records of the board of commissioners of the county of Knox, duly certified under the seal of said county as a true copy, and which transcript is in the words and figures following, to wit:

At a meeting of the board of commissioners of Knox county, begun and held at the court-house in Vincennes, on Monday, the 26th day of February, 1849, pursuant to the above notice—

Members present, Samuel Emison, William Junkins; and James Polke having produced his certificate of appointment, being duly qualified, took his seat as a member of this board:

Whereupon it was ordered by the board that the county of Knox subscribe two hundred thousand dollars to the capital stock of the Ohio and Mississippi Railroad.

Ordered, that the above order be published in the papers of Vincennes.

STATE OF INDIANA,
Knox County.

FRIDAY, 3, *o'clock p. m., Oct.* 25, 1850.

The board of commissioners of said county convened at the court-house, Vincennes, in accordance with the notice of the auditor of the county aforesaid, duly served on them by the sheriff of said county, to make a subscription on behalf of said county to the Ohio and Mississippi Railroad Co., and in accordance to and with the wishes of the voters of said county, as expressed at the election held for that purpose in the several townships of said county on the first Monday in March, 1849—

Members present, William Jenkins, James Polke, and Andrew Gardner, commissioners; also present William T. Scott, sheriff of Knox county, and Abraham Smith, auditor.

In the matter of the Ohio and Mississippi Railroad Company.

Now at this time it is ordered by the board of commissioners of the county of Knox, and State of Indiana, that the auditor of said county, in the name and for the county of Knox, subscribe to the capital stock of the Ohio and Mississippi Railroad Company four thousand shares of fifty dollars each, or the sum of two hundred thousand dollars, and that said auditor is hereby authorized and required to issue the bonds of said county to said Railroad Company, in accordance with the third section of an act to amend an act to incorporate the Ohio and Mississippi Railroad Company, approved January 15th, 1849; provided, however, that the proceeds of said bonds shall only be applied to the construction of said railroad eastwardly from Vincennes, except so much thereof

2048

as may be necessary for incidental engineering expenses. Be it further ordered, that said auditor be authorized to vote at all elections and meetings of stockholders, or to appoint his proxy in his place and stead.

Ordered, that the board do now adjourn sine die.

WILLIAM JUNKIN, *Pres.*

At a meeting of the board of commissioners of Knox county, in the State of Indiana, held at the court-house in Vincennes, in said county, on Monday, the 9th day of May, 1853, pursuant to the above notice—members present, Andrew Gardner, William Junkins, and James Scott:

Whereas, it being deemed important for the speedy prosecution of the Ohio and Mississippi Railroad, which is contracted to be completed from Vincennes to the New Albany and Salem Railroad within a period of eighteen months, that the bonds of the county to be issued on the subscription of stock in the Ohio and Mississippi Railroad Company should be issued at an early day, that the company negotiate the same, and use the proceeds in the construction of said road: now, therefore, be it resolved, that upon the requisition of the Ohio and Mississippi Railroad Company, the auditor of Knox county issue the remaining bonds, or such part as may be required in the payment of the stock of said Railroad Company.

Be it also remembered that, on the trial of this cause, the plaintiffs produced the book of subscription of said Railroad Company, and read therefrom in evidence the following subscription therein, to wit:

I, Abraham Smith, auditor of Knox county, in pursuance of the foregoing order, for and on behalf of the county of Knox, in the State of Indiana, do hereby subscribe in the capital stock of the Ohio and Mississippi Railroad Company four thousand shares of fifty dollars each, amounting to the sum of two hundred thousand dollars.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of the com'rs court of Vincennes, this 25th day of October, A. D. 1850. [SEAL.]

AB'M SMITH, *A. K. C.*

Above which said subscriptions in said book were copied all the orders in the above copied transcript of a date prior to the 25th day of October, 1850.

Be it also remembered, that on said trial the plaintiff read in evidence the two following notices and affidavits, to wit:

At a meeting of the board of commissioners of Knox county, Indiana, begun and held at the court-house in Vincennes, in said county, on Monday, the 26th day of February, 1849, pursuant to

previous notice—members present, Samuel Emison, William Junkin, and James Polke, commissioners:

Ordered by the board, that the county of Knox subscribe two hundred thousand dollars to the capital stock of the Ohio and Mississippi Railroad.

Ordered, that the proceedings of this court be published in the "Western Sun" and "Vincennes Gazette."

Ordered, that the meeting adjourn sine die.

(Sun copy.) SAMUEL EMISON, *Pres.*

STATE OF INDIANA,
Knox County, ss:

Richard Y. Caddington, of lawful age, being first duly sworn, on his oath says, that the foregoing copy of the order of the board of commissioners was published in the Vincennes Gazette on the 29th day of February, 1849; that the foregoing is a true and perfect copy of the said order, as the same was published in said paper; that said newspaper was then a newspaper of general circulation in Knox county, and that affiant was then the publisher and proprietor of said newspaper, and further saith not.

R. T. CADDINGTON.

Subscribed and sworn to before me this 8th day of June, A. D. 1857, by the said R. T. Caddington, at Vincennes, Indiana.

In witness whereof, I have hereunto set my hand and notarial seal, at Vincennes, Knox county, Indiana, the day and year above written.

WM. P. HARGRAVE, *N. P.*

"Election Notice."

Notice is hereby given, that an election will be held at the usual place of holding elections in Knox county, on Monday, the 5th day of March, 1849, at which the qualified voters of Knox county will determine, by vote, what, if any, amount of stock in the Ohio and Mississippi Railroad Company the county commissioners of said county will subscribe for in behalf of said county. Those in favor of subscription will write upon their ballots the word "subscription;" those opposed to the subscription will write "no subscription."

(Signed) W. T. SCOTT, *Sheriff.*

Vincennes, Feb. 8, 1849.

STATE OF INDIANA,
Knox County, ss:

On the 3d day of June, 1857, personally appeared before me, the undersigned, notary public in and for said county and State,

Richard Y. Caddington, who being by me duly sworn, says that the notice, of which the above is a true and perfect copy, was published for three weeks successively in the Vincennes Gazette, a weekly newspaper of general circulation in Knox county, Indiana, and that the first of said publications appeared in said newspaper on the (15th) fifteenth day of February, 1849, and the second on the (22d) twenty-second day of February, 1849, and the third on the (29th) twenty-ninth day of February, 1849; and affiant further says that he was then the publisher and proprietor of said newspaper.

R. Y. CADDINGTON.

Subscribed by said Caddington and sworn to before me this third day of June, 1857.

[SEAL.] In testimony whereof, I have hereto set my hand and notarial seal at Vincennes.

J. C. DENNY, *N. P.*

Be it also remembered that, on the trial of this cause, the plaintiffs offered to read in evidence to the jury the writing following, to wit:

Dr. Knox county, State of Indiana, in ac. with the Ohio and Mississippi Railroad Company.

1853, March 31.—To certificate of stock, No. 99, issued to the board of commissioners Knox county, Ia., in payment for the bonds of said county issued to this company of this date, 800 shares, @ $50, - -	$40,000
June 6th.—Certificate No. 128, issued to the board of commissioners of the county of Knox, Ia., bearing date 1st March, '53, in full for 160 bonds of said county, issued to this company, of date March 1st, '52, with the first year's coupons cut off, - - - - -	160,000
	$200,000

1852, Nov'r 30.—By 38 bonds (1 to 38) of the county of Knox, dated 1st March, 1852, for $1,000 each, negotiable and payable at the North River Bank in the city of New York, 25 years after date, with coupons attached, payable at same place annually. These bonds issued in part payment of a subscription of $200,000 to the capital stock of this co., - - - - -	$38,000
Dec. 11.—2 bonds, same as above, - - - - -	2,000
1853, June 6th.—160 bonds, Nos. 41 to 200 inclusive, bearing date 1st March, '52, - - - - -	160,000
	$200,000

STATE OF OHIO,
Hamilton County, City of Cincinnati, ss:

Before the undersigned, a notary public in and for said county, personally appeared Samuel Trevor, who being by me duly affirmed, says that he is the secretary of the Ohio and Mississippi Railroad Company, a corporation of the States of Ohio and Indiana, having its principal office at Cincinnati, and as such secretary has the legal custody of the records and books of said company; and he further says that the foregoing is a true and full copy of the original entry on the books of account of said company, so far as they relate to the account between said company and the county of Knox, in the State of Indiana, and that the original entries on said books have remained unaltered from their respective dates.

SAMUEL TREVOR.

Affirmed and subscribed before me this 25th day of May, 1857.

W. Q. HODGSON, [SEAL.]
Notary Public.

To the reading of which said writing in evidence the defendants objected, on the ground that the same is not sufficiently authenticated and proved to be a copy from said corporation books, and also on the ground that the same is incompetent and irrelevant as evidence in this case; but the court overruled said objection, and permitted said writing to be read to the jury, and the same was read accordingly—to which opinion of the court in overruling said objection the defendant then excepted.

And this was all the evidence shown to the jury on the trial of this cause, and on the evidence above in this bill of exceptions copied the plaintiffs rested their case. Whereupon the defendants suggested to the court that the cause was not made out, for the want of producing in evidence the bonds mentioned in the declaration, and for the want of any evidence accounting for their non-production; and the court thereupon suggested that some such evidence was necessary. Whereupon the plaintiffs, to allow inferior and secondary evidence of the said bonds, read to the court an affidavit in the words following, to wit:

Samuel Judah, being sworn, says that his clients, the plaintiffs in this case, are *are* residents of the city of New York, as he verily believes; that he does not know whether they are the owners of the bonds to which the coupons in evidence were attached or not, and that he believes that the plaintiffs are not the owners of said bonds. Affiant further says that he does not know where said bonds now are, and never did know. Affiant says he wrote to his clients to send him the said bonds and coupons, and they sent him only one bond and all the coupons, and that a second time he wrote them

that it might be important to have the bonds on the trial to show, but has never received any answer.

SAM'L JUDAH.

Subscribed and sworn to in open court, June 9th, 1857.

H. BASSETT, *Clerk.*

Be it also remembered that the defendants offered no evidence on the trial of this cause, and that upon the evidence above in this bill of exceptions copied, and on said evidence only, this cause was submitted to the jury.

Whereupon the defendants pray the court to instruct the jury as follows, to wit:

1st. That the transcript from the records of the board of commissioners of the county of Knox, shown in evidence by the plaintiffs, is not sufficient evidence of itself to prove that the auditor, Smith, therein mentioned, was authorized to execute the coupons shown in evidence.

2d. That unless the plaintiffs prove to the satisfaction of the jury, by evidence from the records of the board of commissioners of the county of Knox, that said board had authorized the said Abram Smith, whose name is signed to said coupons named in the declaration, to execute the said coupons, the jury ought to find for the defendants.

3d. That without producing the bonds named in the declaration, or accounting for their absence, and proving their contents, the pltffs. cannot recover on this action; and as they have only produced one of the bonds, and failed to account for their non-production, they can at most only recover the interest due on it.

But the court refused to give said instructions, or either of them, to the jury; and, on the contrary, instructed the jury that said affidavit of Samuel Judah was sufficient to let in secondary evidence of said bonds; that the documentary evidence above in this bill of exceptions copied furnished sufficient secondary evidence, prima facie, of the existence and contents of said bonds; that the said evidence and documents above copied make out for the plaintiffs a prima facie case for recovery by the plaintiffs on the coupons shown in evidence; and that the jury should make the calculation of the principal and interest on them accordingly.

To which opinion of the court, in refusing to give to the jury each of the instructions above prayed by the defendants, the defendants at the time of said refusal excepted; and to the giving of the instructions so as aforesaid given by the court to the jury, the defendants, at the time of the giving of the same, excepted.

And the defendants pray that this, their bill of exceptions, be signed and sealed by the court, and made a part of the record herein, which is done accordingly.

JOHN McLEAN, [SEAL.]

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States for the seventh circuit and district of Indiana, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in said circuit court for the district of Indiana, between William H. Aspinwall, Joseph W. Alsop, Henry Chauncey, Charles Gould, and Samuel L. M. Barlow, (plaintiffs therein,) and the Board of Commissioners of the County of Knox, (defendants therein,) a manifest error hath happened, to the great damage of the said Board of Commissioners of the County of Knox, as by their complaint appears: and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice be done to the parties in this behalf; you are hereby commanded, if judgment be therein given, that then, distinctly and openly, under your seal, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the seventh day of December next, in the said Supreme Court, to be then and there held, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what may be right, and according to the law and custom of the United States should be done.

Witness the honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this 12th day of June, in the year of our Lord one thousand eight hundred and fifty-seven, and of the independence of the United States the eighty-first.

[SEAL.]

H. BASSETT, *Clerk.*

The foregoing writ of error is allowed. June 12, 1857.

E. M. HUNTINGTON.

Appeal Bond.

Know all men by these presents, that the undersigned are held and firmly bound unto William H. Aspinwall, Joseph N. Alsop, Henry Chancey, Charles G. Gould, and Samuel S. Barlow, in the sum of five hundred dollars, to the payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 12th day of June, 1857.

Whereas the Board of Commissioners of the County of Knox has prosecuted a writ of error to the Supreme Court of the United

States, to reverse a judgment rendered by the circuit court of the United States for the district of Indiana, at its May term, 1857, in a cause in which said obligees were the plaintiffs and said Board was the defendant:

Now, therefore, the condition of this obligation is such, that if the said Board shall prosecute said writ of error to effect, and answer all costs on failure so to prosecute said writ of error, then this bond shall be void, else remain in full force.

J. N. EASTHAM, [SEAL.]
JAMES DICK, [SEAL.]
W. BUTCH, [SEAL.]

Attest: ABRAM T. ELLIS.

Approved August 7th, 1857.

E. M. HUNTINGTON, *Judge.*

UNITED STATES OF AMERICA, *ss:*

To William H. Aspinwall, Joseph W. Alsop, Henry Chauncy, Charles Gould, and Samuel L. M. Barlow:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, on the first Monday of *of* December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the seventh circuit and district of Indiana, wherein the Board of Commissioners of the County Knox is the plaintiff and you are the defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Elisha M. Huntington, one of the judges of said circuit court for the district of Indiana, this 12th day of June, in the year of our Lord eighteen hundred and fifty-seven.

E. M. HUNTINGTON.

I acknowledge service of the above, Aug. 22, 1857.

JOHN COBURN,
Attorney for Aspinwall and others.

DISTRICT OF INDIANA, *ss:*

I, Horace Bassett, clerk of said circuit court, do hereby certify the above and foregoing to be a true and complete transcript of the record in the above-entitled case, together with the writ of error and the appeal bond, with the citation attached hereto, and also the cost of this appeal, taxed and allowed by the court, at eight dollars and seventy-six cents.

In witness whereof, I have hereto set my hand, and affixed the [SEAL.] seal of said circuit court, at Indianapolis, this 22d day of August, eighteen hundred and fifty-seven.

HORACE BASSETT, *Clerk.*